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09/800,547	03/07/2001	Aurelia Maza	06640-148 US	4160

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EXAMINER	
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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

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GROUP 1700

Application Number: 09/800,547
Filing Date: March 07, 2001
Appellant(s): MAZA ET AL.

Ellen Plotkin
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed September 19, 2006 appealing from the Office action mailed June 26, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner, which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

This application, 09/800,547 was before the Board of Appeals in their decision of September 30, 2004.

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5632596	Ross	5/1997
4,423,084	Trainor et al	12-1983
6,235,336	Akashe et al	5-2001

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1, 3, 5, 6, 8, 9-11, 13-16, 18-26 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Trainor in view of Ross for the reasons set forth by the Board of Appeals in their decision of September 30, 2004 and for the reasons set forth below.

Trainor discloses making salad dressing. Table 1 and example 1 shows ingredients that include starch, acidulant, egg, oil, water and sweetener. These ingredients are mixed together and then processed in a colloid mill that includes a rotor and a stator. The claims appear to differ from the reference in the suggestion of the specific apparatus features of the colloid mill. Trainor is silent as to the measurements of the rotor and stator, but Ross provides the specific apparatus features of the rotor and stator. Ross teaches the use of the rotor and stator that is known for use in the manufacture foods and emulsions (column 1, lines 5-14). It would have been obvious at the time the invention was made to utilize the rotor and stator or Ross in an edible emulsion, which is a spoonable dressing. Further it would have been obvious to prepare a pre-emulsion prior to emulsifying the food product in order to assist in providing for a uniform final product. Thus in this case applicant is merely utilizing a known colloid

mill that has the rotor and stator of the claims, in a known process for making an emulsified dressing. Applicant has amended the claims to clarify that the motor speed is adjustable. No unobvious or unexpected results are seen from the recitation of the manipulation of the motor speed. This is an apparatus limitation, carrying no weight in these process claims. Applicant has further amended the claims to indicate that the mayonnaise and salad dressing are made in the same production line. No unobvious or unexpected results are seen from the use of one production line for mayonnaise and salad dressing. Efficient use of factory space would be expected from successful food processor.

With regard to claim 28, no unobvious or unexpected difference is seen between the product resulting from the present process and the product resulting from the claim.

Claim 29 is rejected under 35 U.S.C. 103(a) as being unpatentable over Akashe (6,235,336) in view of Ross (5,632,596).

Akashe discloses using salted egg yolks to make an emulsion in a device with a rotor/stator shear device. The ingredients in the product are shown in the first Table in column 6. The claims appear to differ from Akashe in the suggestion of the specific apparatus features of the shear

device. Ross teaches the use of the rotor and stator that is known for use in the manufacture foods and emulsions (column 1, lines 5-14). It would have been obvious at the time the invention was made to utilize the rotor and stator of Ross in an edible emulsion that does not contain starch. Further it would have been obvious to prepare a pre-emulsion prior to emulsifying the food product in order to assist in providing for a uniform final product. Thus in this case applicant is merely utilizing a known colloid mill that has the rotor and stator of the claims, in a known process for making an emulsified mayonnaise. Applicant has amended the claims to clarify that the motor speed is adjustable. No unobvious or unexpected results are seen from the recitation of the manipulation of the motor speed. This is an apparatus limitation, carrying no weight in these process claims. Applicant has further amended the claims to indicate that the mayonnaise and salad dressing are made in the same production line. No unobvious or unexpected results are seen from the use of one production line for mayonnaise and salad dressing. Efficient use of factory space would be expected from successful food processor.

(10) Response to Argument

The Trainor rejection

Appellant argues that Trainor does not show the use of an emulsifier with a specific stator and rotor arrangement. But Ross, as previously argued, teaches these features. Appellant argues that Trainor does not show making multiple products in one pass. This argument has been considered but is not persuasive because the claims are directed to a process and not to the utility of an apparatus. Appellant argues that Trainor does not teach the use of a pre-mix of raw ingredients. This has been considered but is not persuasive. Step 2 in Trainor (see Figure 1 and column 6, lines 14-18) acts as a pre-mixer. Appellant argues food texture but the claims are directed to a process and no difference is seen between the texture formed from the combination of the references and the texture formed from the process. Appellant urges that Trainor and Ross are not combinable. But Ross teaches the use of the rotor and stator that is known for use in the manufacture of foods and emulsions (column 1, lines 5-14). It would have been obvious at the time the invention was made to utilize the rotor and stator of Ross in an edible emulsion, which is a spoonable dressing. Further it would have been obvious to prepare a pre-emulsion prior to emulsifying the food product in order to assist in providing for a uniform final product. Thus in this case applicant is merely utilizing a

known colloid mill that has the rotor and stator of the claims, in a known process.

The Akashe rejection

Appellant argues that the references do not describe a starch free mayonnaise. But mayonnaise has a standard of identity established by the Food and Drug Administration, which defines mayonnaise as being starch free. Appellant argues that the claims do not call for modified eggs and is not aimed at starch-free dressing. But the mayonnaise in Akashe does not contain starch and thus is clearly starch free. No unobvious difference is seen from the starch-free dressing of the claims and the dressings of Akashe in view of Ross. Appellant urges that there is no motivation to combine the references. It is very well known in the art that mayonnaise and salad dressing are very similar foods, the products being distinguishable by the presence or absence of eggs. If one of ordinary skill in the art wanted to extend his salad dressing line to include mayonnaise, it would have been obvious to expect that the colloid mill in Ross could have been useful as the rotor/stator shear device employed by Akashe at column 6, lines 30-31.

Appellant argues processing rate but this feature is really a function of the size of the manufacturing equipment used in the process and does not alone constitute unobviousness.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Carolyn Paden

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